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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 106

DAVE EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 129

JOSEPH AMABILE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 168

SALVATORE BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Tre opinions of the court of appeals (Amabile Pet. Apps. A, B) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on January 9, 1968 (Nos. 106 and 168) and on April 26, 1968 (No. 129). Petitions for rehearing *en banc* in Nos. 106 and 168 were denied on April 17, 1968. The petition for a writ of certiorari in No. 106 was filed on May 16, 1968, and in No. 129 on May 25, 1967. In No. 168 Mr. Justice Marshall extended the time to file to June 10, 1968, and the petition was filed on June 7, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

All petitioners present the following questions:

1. Whether the evidence was sufficient to show a conspiracy to violate the provisions of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the trial court erred in denying a request for the production of grand jury minutes.

Evans and Amabile (Nos. 106 and 129) present the following question:

3. Whether, in the circumstances of this case, the trial court properly restricted cross-examination of a government witness about a pending state indictment against him and about a federal tax investigation into his affairs.

Evans and Battaglia (Nos. 106 and 168) present the following question:

4. Whether, in the circumstances, the trial court erred in not permitting an inquiry as to the present address of the witness who had been the victim of the extortion.

Amabile and Battaglia (Nos. 129 and 168) present the following question:

5. Whether Congress intended the Hobbs Act to cover the circumstances shown in the present case.

Evans (No. 106) presents the additional question:

6. Whether the trial court erred in rejecting his attempt to show a good reputation in the business community.

Amabile (No. 129) raises the following question:

7. Whether the trial court erred in terminating a line of inquiry about Jencks Act material.

Battaglia (No. 168) raises the following question:

8. Whether the court below erred in determining for itself that a conversation overheard in the course of an electronic surveillance that took place long before the events in question was irrelevant to this case.

STATUTE INVOLVED

18 U.S.C. 1951 provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to

do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petition-

ers were convicted of conspiring to obstruct interstate commerce by means of extortion in violation of 18 U.S.C. 1951. Amabile and Battaglia were sentenced to imprisonment for fifteen years, and were fined $10,000. Evans was sentenced to imprisonment for ten years. The court of appeals, in separate opinions, affirmed the convictions, one judge dissenting (Pet. App. A, B).[1]

The relevant evidence showed that Evans was employed as a construction superintendent for the Riley Management Corporation, which developed real estate in Northern Illinois. The president and owner of 90% of the shares of the corporation was William Riley (A. 489-490, 497).[2] Riley's company purchased materials and supplies from "various parts of the country" (A. 492). In June of 1964, Riley and Evans discussed arrangements for securing subcontractors for the development of an apartment complex in Lansing, Illinois. Riley cautioned Evans that he wanted to keep the Lansing project a secret from "the boys in Melrose Park"—"especially * * * from Joe Shine [Petitioner Amabile] and Nick Palermo," since Riley feared that he would otherwise be "forced to use them again as subcontractors" (A. 502). Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family (A. 545-567). Evans said that he "knew of the

[1] Unless otherwise indicated, "Pet. App." refers to the appendices to the petition filed by Amabile, which sets out all of the opinions below.

[2] References are to the Joint Appendix on file with the Clerk of this Court.

problem." He agreed to keep the project a secret from Amabile and Palermo (A. 502-503).

In the early part of July 1964, Nick Palermo telephoned Riley and requested his presence at his Melrose Park establishment. Riley met with Palermo and Amabile (A. 503, 505) and was told that Palermo was to get the plumbing contract on the Lansing project. Riley protested that he did not plan on giving Palermo the work, but Amabile threatened that he would "stop" other Riley projects in Northlake and Westmont. Amabile added that "he knew how to handle wise guys and that [Riley] would be walking the streets with a candy cane;" that "they knew where [Riley's] mother lived;" that "he knew where [Riley's] kids went to school and they had a baseball bat to handle wise guys like [him]" (A. 506-507). In September or October 1964, Riley awarded the Lansing plumbing contract to Palermo because he feared economic ruin as well as physical harm to his family and employees (A. 507, 511). A few days after that July meeting with Amabile and Palermo, Riley told Evans about the meeting and said that he was "disgusted and frightened" because they had learned about the Lansing project (A. 512). He instructed Evans to obtain for the sewer work a contractor who was "foreign" to Amabile and Palermo (A. 515).

In the meantime, however, Amabile had already set the machinery in motion to obtain the sewer contract. He had told Mike DiVito, a sewer contractor, that he (Amabile) could not get the sewer work if DiVito's name were on the contract (A. 118-120). Amabile advised DiVito and unindicted co-conspirator Rocco

Pranno that if they could "come up with a good clean guy" to front for the sewer contract operation Amabile could get the contract (A. 124). Thereafter, Pranno hired Henry LaKey, an experienced construction foreman, for this purpose (A. 126-127). In the middle of September, Evans, who was described as Amabile's "man" (A. 129, 281, 284, 302, 309, 362) and had been placed by Amabile in the Riley organization (A. 309), met with Pranno, DiVito, and Amabile at the latter's apartment. Amabile indicated his approval of LaKey as a front man. He told Pranno and DiVito that before they received the sewer contract, he was to be assured of $20,000 in cash. After Evans showed Pranno and DiVito the plans and specifications for the project, they agreed to the $20,000 fee (A. 127-129). In the latter part of the same month, Evans, LaKey, and DiVito again met with Amabile at his apartment. After discussing certain project specifications, Amabile reminded DiVito that he (Amabile) was to get $20,000 "off the top" (A. 255-256). When Evans, LaKey, DiVito, and Amabile met for a third time on October 1, DiVito suggested that there was not enough money in the contract to give Amabile his $20,000 cut. At Amabile's suggestion, Evans then rewrote the proposed contract to include an additional $45,000 (A. 262-266). LaKey, DiVito, and Pranno then set up a new corporation (Carlson Construction & Equipment Company, hereinafter "Carlson") in which LaKey was installed as the titular president (A. 130-132, 270-277). Evans, after recommending the company to Riley as having an excellent reputation, then awarded Carlson the con-

tract (A. 132, 268, 516). Payments were to be made to Carlson by a suburban savings and loan company on the basis of payout slips issued by Riley's company (A. 269-270, 519, 903). Carlson began construction in October 1964 (A. 134, 521).

Before the first draw from the savings and loan association, Amabile told LaKey that he was going to give Evans $5000 for his role, instead of $7500 (A. 297). When Amabile and LaKey later met Evans, Amabile gave him a "wad of bills" (A. 300).

On November 12, LaKey received the first draw, in the amount of $47,000. He deposited $39,000 in the Carlson payroll account, and gave another $8000 to Pranno (A. 303-305). Shortly thereafter, at Amabile's directions, LaKey withdrew $20,000 from the Carlson payroll account and gave it to Amabile (A. 306).

In late November or early December, LaKey went with Amabile to a horse farm in Pingree Grove where Amabile introduced LaKey to petitioner Battaglia as "Hank LaKey running the job for them in Lansing, Illinois" (A. 331). LaKey overheard Battaglia saying to Amabile that they had planned on giving Evans too much of a cut (A. 332-333). After leaving Battaglia, Amabile warned LaKey not to mention the visit (A. 333-334, 338-339). When LaKey mentioned to Evans that he had visited Battaglia's farm, Evans warned him not to let Amabile hear him talking about the meeting (A. 339-340).

Prior to the second draw, LaKey learned that Riley had allocated only $120,000 for the sewer contract, instead of the $200,000 LaKey had anticipated. He

told Evans that he was concerned about the other $80,000, since he was obligated on all of Carlson's contracts for materials. In response, Evans stated, "I told you don't get worried about it. I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man * * * We will see that the money is in the bank for you" (A. 342).

In January 1965, LaKey and Evans prepared the necessary papers for the second draw of $48,000 (A. 344). Riley's comptroller, however, refused to authorize the issuance of a pay-out slip because Carlson had failed to pay materialmen (A. 345-346). LaKey immediately reported the refusal to Amabile, and Amabile quickly directed Evans and LaKey to see Riley the following morning to obtain the necessary authorization for the second draw (A. 346-347). On that visit, Riley told LaKey, in Evans' presence,[3] that he would not authorize the second draw until Carlson paid its bills (A. 349-351, 527-528, 531). LaKey then reported to Amabile that Riley still refused the second authorization. Amabile told LaKey to return the following morning at which time he would "* * * get this thing straightened out for once and for all" (A. 351).

The next day, LaKey and Amabile visited Riley at his office. Riley narrated what happened at that meeting:

> Mr. Shine [Amabile] told me that I had to pay this man, that this man was a friend of theirs;

[3] In order to keep Riley from knowing that they were working together, they entered separately and eventually convened in Riley's office (A. 347).

that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.

I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him. [A. 533-534.]

* * * *

Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that "the man" wanted him paid.

* * * *

He told me "the man" said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs. [A. 535.]

Riley subsequently authorized the payment of $48,000 because he was "afraid" (A. 535-536). This was the sum mentioned in the indictment. As a result of this payoff, assets of Riley's company were depleted and he had to terminate construction at the Lansing project (A. 500). Moreover, steel which was ordered from the LeClede Steel Company in St. Louis, Missouri, was never paid for (A. 566-567).

In February or early March 1965, Pranno and DiVito drove to Battaglia's farm to have "the man" settle an internal dispute with Amabile, who met them there. In the course of describing the grievance, which involved a loan that he and DiVito had made to the company that LaKey was fronting, Pranno reminded Battaglia that $20,000 from the Lansing project was intended for him. When Pranno men-

tioned a second time that the $20,000 was to go to Battaglia, Battaglia again indicated his awareness of his financial interest in the venture (A. 171-172).

ARGUMENT

1. All petitioners contend that there was insufficient evidence showing a conspiracy to extort money from Riley. There can of course be no doubt, on this record—and petitioners do not suggest to the contrary—that they knowingly and voluntarily combined with the other conspirators in a criminal course of conduct designed to mulct funds from the Lansing project. We submit that there can be no more doubt that they joined in that effort with full knowledge that Amabile would, if necessary, revert to what the dissenting judge below aptly termed "his more accustomed role, that of an extortionist" (Pet. App. B 57), in order to achieve the object of that conspiracy. The basic flaw in petitioners' argument, as we shall see, is that it unrealistically assumes that the object of the conspiracy was mere "fraud", as such. On the contrary, however, the object of the consort was to expropriate handsome shares of the investments in the Lansing project; the use of fraudulently contrived and inflated contracts was a technique for achieving this objective. But the jury was fully warranted in concluding that petitioners contemplated more forceful measures if, as happened, the "mere" fraud ran into a snag.

Amabile and Battaglia seem to agree that joint venturers embarked on a criminal conspiracy take their chances as to those methods used by their associates *if*

those methods fall within the common purposes of the venture as they understand it, see *United States* v. *Peoni*, 100 F. 2d 401, 403 (C.A. 2); *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2); *United States* v. *Andolschek*, 142 F. 2d 503, 507 (C.A. 2).[4] But Battaglia argues that there was no evidence showing that it was his understanding that the conspiracy would embrace extortion, if needed. Amabile does not argue lack of evidence with respect to his own implication in the extortionate acts; he contends, however, that neither Evans, Battaglia, nor Pranno were aware that *he* would resort to extortion to achieve the objects of the criminal conspiracy and thus that there was no conspiracy to violate the Hobbs Act (Pet. 38-41). The evidence, however, is to the contrary.

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[4] In accordance with the general principles set forth in the cited cases, the trial court charged (A. 968-969):

> When a person embarks upon a criminal venture of indefinite outline with other persons, he may be held responsible for actions taken by his co-conspirators which tend to further the common objectives as he understood them. The government need not show knowledge of all those acts or of any particular phase of the scheme. It is necessary, however, that the government prove from all the evidence and beyond a reasonable doubt that each defendant was aware of the common purposes, that each accepted the purposes, made them his own, and that each phase of the conspiracy charged in this indictment was within the scope of those criminal purposes.
>
> A common purpose may be inferred by you, ladies and gentlemen of the jury, if you find from the evidence and beyond a reasonable doubt that the persons concerned pursued the same object and adopted means leading to the same unlawful results, even though individual defendants or co-conspirators may have done acts in furtherance of the common design apart from and unknown to the others.

Thus, the record demonstrates that Amabile had "placed" Evans in the Riley organization in February or March 1962 (A. 309, 498)—before Riley had begun construction on his Northlake project. When Riley began the Lansing project and mentioned to Evans that he had been "forced" into using Palermo on the Westmost project, Evans said that he "knew of the problem" (A. 502). During the latter part of 1964, Riley told Evans that he was "disgusted and frightened" because Amabile had learned about the Lansing project (A. 507), and that he was again being "forced" to use Palermo (A. 522-523). Finally, it was Evans who told LaKey that he would talk to Amabile and that Amabile would "talk" to Riley about the shortage in the drawing account. Thus it was Evans who, despite his awareness of his employer's fear of Amabile, actually sponsored the confrontation between Amabile and Riley. In these circumstances, there was clearly sufficient evidence from which the jury could conclude that Evans, fully aware of Amabile's methods of enforcement, had joined and remained in the conspiracy with full knowledge that Amabile would resort to those methods, if necessary, in order to achieve the objective of the group.

With respect to Battaglia, the evidence was equally sufficient. Although his role was, for the most part, the covert function of the "silent partner," the evidence showed that Amabile was Battaglia's subordinate in the criminal hierarchy, and that Amabile acted at his direction. Battaglia was aware of the illicit scheme to siphon funds from the Lansing project, and knew he was to receive a substantial share of the

proceeds.[5] In these circumstances, the jury could conclude beyond a reasonable doubt at least that Battaglia understood the scheme to include resort to threats if necessary, even if his authority over Amabile, coupled with the phrasing of Amabile's threats to Riley, do not warrant a further—but unnecessary—inference that Amabile actually conveyed the warning at Battaglia's direction.[6]

In light of the sufficiency of the evidence showing that Evans and Battaglia contemplated that their conspiracy might embrace resort to force, Amabile's argument that he cannot be convicted of *conspiracy* to extort necessarily falls.

2. After the government witness DiVito had testified on direct examination, counsel for Amabile moved for the production of his grand jury testimony. The government consented to a procedure whereby the testimony would be turned over to the court for an *in camera* inspection, but the defendants indicated no interest in this procedure (A. 195). The motion for production was later denied (A. 233). Motions for the production of LaKey's and Riley's grand jury testimony were similarly denied (A. 389-390, 689).

The court below held, on the appeal by Evans and Battaglia, that "no particularized need for this testimony was shown, nor was there any showing that the

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[5] Battaglia suggests (Pet. 9, note 9) that his statements at the arbitration conference at his farm were inadmissible because made after the extortion from Riley. This ignores the fact that they were his own statements and were chargeable to him.

[6] See Batt. Pet. 8, note 8.

ends of justice required production" (Pet. App. B 41). In the subsequent appeal by Amabile, the court of appeals, with the government's acquiescence, ruled that as of the date of its opinion, defense counsel would henceforth be entitled to access to the relevant grand jury testimony of witnesses who testified at trial unless the government showed why access should be denied.[7] It nevertheless reaffirmed its earlier holding that no "particularized need" had been shown (Pet. App. A 10-12); see also *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2).[8]

The decision of this Court in *Dennis* v. *United States*, 384 U.S. 855, did not disturb the earlier holding in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, that, before a defendant is entitled to the grand jury testimony of a witness who has testified at trial, he has the burden of showing a "particularized need" for inspection. As noted by this Court in *Dennis*, the trial judge retains the function of "deciding whether a case has been made for production." *Id.* at 875. And in *Dennis*, the Court listed five separate circumstances that showed why the de-

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[7] In accordance with this policy, as noted by Battaglia (Batt. Pet. 22, Note 20), the grand jury testimony of Riley was disclosed in *United States* v. *Amabile*, No. 67 Cr. 86, another Criminal Case against Amabile. That testimony is appended to Battaglia's petition at 68a-100a.

[8] That the court of appeals applied general principles of *stare decisis* to Amabile's case, while indicating that a more liberal discovery procedure should prevail in the future, does not violate principles of due process of law. *E.g.*, *Durham* v. *United States*, 214 F. 2d 862 (C.A.D.C.), certiorari denied, 364 U.S. 854.

fendants in that case had such an interest in access to the grand jury minutes. *Id.* at 872-873. Here, however, counsel for Amabile moved for a wholesale production of the grand jury testimony as a matter of right, and offered the court no explanation of why there was special need for the grand jury testimony of the several government witnesses. When the original request was made, counsel contended that he was entitled to grand jury testimony as a matter of right under the Jencks Act, 18 U.S.C. 3500 (A. 195). It is obvious, we submit, that defense counsel were merely engaging in a "fishing expedition".[9]

In fact, most of Riley's grand jury testimony related to matters that were not relevant to the present case, but bear on the other, later prosecution of Amabile (No. 67 Cr. 86). Despite this governmental interest in not permitting premature, random disclosure, defense counsel ignored an offer for an *in camera* examination in which the then irrelevant material could have been excised. Thus, petitioners' failure to obtain the relevant Riley grand jury testimony was, in large part, of their own making.

Moreover, with respect to DiVito and LaKey, the error, if any, of the prosecutor in failing to respond to petitioners' wholesale request for production of their grand jury testimony was, in the circumstances, harmless. We are lodging with the Clerk of this Court the grand jury testimony of DiVito and LaKey,

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[9] Although counsel for Evans repeatedly joined in other motions which he believed to be in his client's interest, he did not join in the motions for production at trial, and did not assign the court's ruling as error in the court below.

together with the Jencks Act material relating to these witnesses which was actually turned over to the defense. As the grand jury transcript clearly shows, the only testimony which they gave before that body was a reading of signed statements made to agents of the Internal Revenue Service. These statements, however, had been turned over to the defense in the original form, under the provisions of 18 U.S.C. 3500. In these circumstances, the only information which the defense could have obtained from the grand jury minutes was already in their possession. The "failure to require production * * * was [thus] empty of consequence," *Rosenberg* v. *United States*, 360 U.S. 367, 370-371, and there is accordingly no occasion for further review.

3. Amabile and Evans contend that the trial court committed reversible error in restricting Amabile's attempt to show that Riley was under a state indictment for theft and under tax investigation by the Internal Revenue Service at the time of trial. In the circumstances, however, the ruling of the trial court was proper. As noted by this Court in *District of Columbia* v. *Clawans*, 300 U.S. 617, 632:

> The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, *and of slight bearing on the bias and credibility of the witnesses*, are not reversible errors. [Emphasis added.]

Here, as he perceived it in context, the trial judge was confronted with two conflicting principles—that which states that "bias"—*e.g.*, an expectation of leniency for cooperation with the government—may always be shown, and that which forbids general impeachment of character by way of showing that the witness is under indictment or investigation. After receiving an offer of proof as to what these questions were designed to elicit, the trial court properly held that the danger of impeachment by an improper means outweighed the probability of showing bias on the part of the witness. That a person's tax matters are under investigation is not probative of bias towards the government. And, in any event, the United States Attorney is not empowered to chart the course of a state prosecution or federal tax investigation.

Moreover, notwithstanding the trial court's ruling, petitioners managed to bring these facts to the attention of the jury through a series of questions, proper and improper, designed, as the court below observed (Pet. App. A 8), to "smear" the witness by innuendo. Thus, besides asking the very questions which the court disallowed, defense counsel established that Riley did have tax problems (A. 644, 662, 663); had met with federal agents in the office of two lawyers who were prominent in the defense of criminal tax cases (A. 658); and had "a problem in the State Court" (A. 663). In addition, the defense implied by innuendo that Riley had been a drunkard (A. 621, 622, 623); that he had been sued for fraud (A. 641); that he had "bounced" several checks (A. 669, 671);

and that a complaint had been filed with the State's Attorney for a bad check charge (A. 690).[10]

4. On cross-examination, counsel for Battaglia asked Riley his present address. Government counsel objected to the question and requested a hearing outside the presence of the jury. The court sustained the objection without a hearing (A. 723).

Battaglia and Evans[11] now contend that this Court's decision in *Smith* v. *Illinois*, 390 U.S. (see, also, *Garafolo* v. *United States*, 390 U.S. 144), requires a *per curiam* reversal in this case. In *Smith*, however, this Court reaffirmed what was said in *Alford* v. *United States*, 282 U.S. 687, 694, that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court" and that "[t]here is a duty to protect [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." To that category Mr. Justice White, in a concurring opinion, added "those inquiries which tend to endanger the personal safety of the witness." *Smith*, *supra*, at 133-134. Here the danger to Riley's personal safety was obvious to the trial judge. This case directly involved threats of violence against Riley and his family by an underworld conspiracy. Moreover, the trial judge had been advised that Riley was under the protective cus-

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[10] The state indictment was for forgery (see Amabile Pet. 25). Seven questions of the type discussed are quoted by the court below (Pet. App. A 7, note 3).

[11] The issue was not raised by Evans at trial or in the court below. It was first mentioned in a petition for rehearing filed by Battaglia.

tody of the United States Attorney (A. 41), and that the government witnesses were escorted to the courtroom under strict security measures (See A. 179-180). The trial court was also well aware of the "enforcement" methods practiced by Amabile. In these circumstances—where the danger of intimidation and reprisal was apparent at the time the question was asked—the trial judge did not abuse his discretion in terminating the line of inquiry. *Capriola* v. *United States*, 61 F. 2d 5, 10 (C.A. 7), certiorari denied, 287 U.S. 671.[12]

5. *a.* There is no substance to Battaglia's argument that Congress did not intend the Hobbs Act to apply to the circumstances shown here. His discussion of this contention (Pet. 10-18) indicates that the issue is merely the challenge to the sufficiency of the evidence, under a different label. We have already shown that the evidence was adequate to establish all statutory elements. Given these facts, the statute clearly applies. As noted by this Court in *Stirone* v. *United States*, 361 U.S. 212, 215:

> That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree."

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[12] In *Smith*, of course the witness refused to give his true name or address, and thus in the absence of awareness of his very identity, the court found that a "rudimentary inquiry" had been "emasculate[d]." 390 U.S. at 131. The question of Riley's current address hardly had such significance in the present case.

Congress spoke in broad language because "elimination of terroristic activities * * * was the aim of the statute * * *." *United States* v. *Local 807*, 315 U.S. 521, 530. Thus, the activities engaged in by these petitioners—manifesting itself in terms of professional gangsterism and terrorism—are clearly within the coverage of the Hobbs Act.

b. Nor is there any more merit in Amabile's related suggestion (Pet. 33-38) that the extortionate acts committed in furtherance of the conspiracy did not in any degree obstruct, delay or affect interstate commerce. The evidence—which the jury credited—showed that Riley's Lansing construction project depended upon the shipment of supplies and materials in commerce, that he feared that the payments extracted would cause the "ruination" of his company, and that the extortion practiced upon Riley actually caused a depletion of assets of his company which, in turn, necessitated termination of that project. In these circumstances, the trial court properly charged that such evidence, if believed, would authorize an inference that interstate commerce was affected.[13] See *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari de-

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[13] The court charged (A. 972-973):

> If you believe beyond a reasonable doubt that the resources of Riley Management Corporation were depleted by extortion, and you must find the government has proved extortion beyond a reasonable doubt, and if you further believe that the business of Riley Management Corporation conducted at the job site in question depended on shipments of materials and supplies in commerce, you may infer that the extortion in some way or degree did obstruct, delay or affect interstate commerce.

nied, 314 U.S. 687; *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; *United States* v. *Lowe*, 234 F. 2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; *United States* v. *Green*, 246 F. 2d 155 (C.A. 7), certiorari denied, 355 U.S. 871. This is especially true where, as here, the evidence undeniably showed that Riley was unable to pay out-of-state suppliers of materials ordered for the project as a result of the depletion in assets (A. 566-567).

6. In an attempt to establish his general reputation for honesty, integrity, and veracity, Evans called four defense witnesses, all of whom had been associated with him on various Riley projects (A. 811-813, 816-818, 820-825, 839-840). After establishing that each had worked with Evans, and that employees on the various Riley projects had discussed their dealings with Evans, counsel asked each witness if he could testify to Evans' reputation. On each attempt, the court sustained the government's objection to the question put (A. 813-816, 818-819, 825-828, 843, 847).

In the circumstances, the court below properly held that a proper foundation had not been established to show the general reputation of Evans. This Court stated in *Michelson* v. *United States*, 335 U.S. 469, 482, that "[r]eputation is the net balance of so many debits and credits * * *," and that, in order to establish a general reputation, "the witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is

regarded." *Id.* at 478. Here it is clear that the witnesses were not acquainted with Evans' community, but only with persons who had associated with Evans for a limited period in a limited relationship on the Riley projects. These persons, it is clear, cannot be considered acquainted with the "net balance of so many debits and credits" which would determine Evans' general reputation, and were thus not capable of assessing that reputation at all. See *Williams* v. *United States*, 168 U.S. 382, cited with approval in *Michelson, supra*, at 481, note 17. This conclusion is confirmed by the uncontested fact that Evans had been placed in Riley's employ by Amabile and was clandestinely conspiring to defraud the very employer for whom the various "character" witnesses worked when they were observing Evans. In this context, the lack of traditional foundation for the accuracy of their impression of Evans' character is underscored by the likelihood that his business reputation was in fact a charade.

7. As noted in the Statement, Amabile had been connected with earlier Riley projects. On one specific occasion in September of 1963, Amabile and Palermo visited Riley with intent to obtain the plumbing contract for his Westmont project (A. 560-565). According to Riley's testimony, when he indicated that he would not give the contract to Palermo, Amabile—

> * * * told me I was nothing but a wise guy. I should quit being a wise guy and that he would handle me with a baseball bat if I didn't stop trying to be a wise guy. [A. 564.]

Amabile added at that same time—

> "You little Irish s.o.b., we know—" He told me he knew where my mother lived. He told me he knew where my kids went to school. He told me that I would need a candy cane from then on out if they did not get the work * * * [and] * * * if I did not use them nobody is going recognize me. [A. 565.]

Under the provisions of 18 U.S.C. 3500, defense counsel obtained possession of three F.B.I. statements and two Internal Revenue Service statements made by Riley. On cross-examination, counsel for Amabile asked Riley if he had related the specific conversation —that is, the exact threatening words used by Amabile—to F.B.I. Agents Dallman and Kotsos during the interview of October 5, 1965, and whether the specific words were transcribed in the F.B.I. memorandum covering that interview. As Riley was reading the F.B.I. memorandum on the witness stand,[14] the court, at the government's request, directed the witness not to answer the question (A. 683-684). After an objection was sustained to a similar question relating to another F.B.I. interview, counsel made an offer of proof to the effect that he intended to bring out the fact that the specific wording of the threats was not transcribed in any of the Jencks Act material. The court rejected the offer of proof and sus-

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[14] Contrary to Amabile's suggestion (Pet. 45, footnote 3), Riley had never read the memoranda relating to the F.B.I. interviews before he took the witness stand (A. 687, 709). The statements which Riley testified he had read before the grand jury were signed statements given to the Internal Revenue Service.

tained objections to similar questions relating to another F.B.I. memorandum and two Internal Revenue Service memoranda (A. 658-688).

In the circumstances, the district court did not err in terminating the line of inquiry. The provisions of 18 U.S.C. 3500 relating to the production of statements to government agents do not modify or affect the ordinary rules of evidence regarding the admissibility of such statements which have been produced. *Palermo* v. *United States*, 360 U.S. 343; *Campbell* v. *United States*, 373 U.S. 487. Here, counsel for Amabile offered the lack of reference to specific threats in the Jencks Act material in an attempt to impeach Riley's earlier testimony to the effect that he had reported such threats to the government agents. That the reports did not reflect the exact wording of the threats would be relevant only if it was shown that the government agents had transcribed Riley's statements *in haec verba*. That foundation was not established. Prior to the offer of proof, counsel for Amabile did not establish whether or not the agents who had prepared the reports had transcribed Riley's statement in all of its details, including specific language of threats, or whether the agents merely summarized his statement. The record does show that the Interview Reports were prepared after Riley had had "three or four solid days" of conversation with the F.B.I. (A. 709). If the reports were merely a summary, then the absence of the specific wording in the report would be devoid of probative value on the question counsel sought to raise. As the court below noted, counsel chose not to call the government agents

in order to establish the necessary foundation, or to determine whether Riley reported the actual threats to them.

8. Prior to trial, Battaglia moved for a hearing to determine the existence and extent of electronic eavesdropping. The government opposed the motion, in accordance with the view at the time that there was no duty to disclose material not even arguably relevant to the case. The district court denied the motion. After this Court's decision in *Kolod* v. *United States*, 390 U.S. 136 (motion to amend the order of remand set down for reargument, *Alderisio* v. *United States*, No. 133, October Term, 1967), Battaglia filed a motion with the court of appeals to remand the cause to the district court for an "adversary hearing" comporting with the requirements of *Kolod*. In response to that motion, the government filed with the court of appeals three documents which reflected three brief conversations, two of which occurred in 1960 and one in 1961—three-to-four years before the events here involved. The court below, in denying the motion for remand, held (Battaglia Pet. 44a-45a):

> A careful *in camera* examination of the transmitted material reveals that these conversations were utterly irrelevant to these convictions. We are frequently called upon to determine relevancy as a matter of law. This case is still pending here on a petition for rehearing *en banc* and the documents are also before us. These factors, coupled with the utter irrelevancy of the documents make it appropriate to dispose of the matter here. Review here also avoids additional delays to defendants. In our view, *Kolod* does not require fur-

> ther District Court action in the circumstances of this case. If there were any doubt as to the tainting of these convictions by the use of these documents, we would afford relief to defendants. There being no such doubt, there is no need to vacate our judgment and remand for a District Court documentary review.

In the circumstances, the court of appeals did not err in denying the motion for remand to determine the relevancy of monitored material which it had already found to have been "utterly irrelevant" as a matter of law. The opinion of the court below clearly pointed out that if there had been any doubt as to relevancy, a remand would have been ordered. Inasmuch as each of the defendants challenged the sufficiency of the evidence, the court below was, as its lengthy opinion demonstrates, quite familiar with the factual issues of the case, and was thus in an adequate position to determine the relevancy *vel non* of the monitored conversations.[15]

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[15] Judge Swygert dissented and thought that the case should have been remanded to the district court. He did not dissent, however, from the majority's finding that the material was "utterly irrelevant," but instead concluded that even if this Court modifies the remand in *Kolod* in accordance with the government's motion, disposition of the question should properly be made by a district judge. Our position in *Kolod* would not require that the district court make an initial determination as to relevancy when the case is actually pending before a court of appeals on full-scale evidentiary review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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